Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities	)	CC Docket No. 02-33
Universal Service Obligations of Broadband Providers	)	
Computer III Further Remand Proceeding Bell Operating Company Provision of Enhanced Services; 1998 Biennial Review – Review of Computer III and ONA Safeguards and Requirements	)	CC Docket Nos. 95-20, 98-10

Comments of

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Table of Contents

Context

At the outset, the Wireline Notice of Proposed Rule Making (CC Docket 02-33) and its attendant referents concerning universal service obligations of broadband providers, enhanced services, and open network architecture (CC-Dockets 95-20 and 98-10) command attention for the scope and range of Federal Communications Commission's (FCC, Commission) ambitions and goals shaping regulatory policy for broadband communications.

First, Commission consideration of broadband access to the Internet over domestic wireline facilities represents an initiative of an independent commission to stimulate aggregate demand, to enhance national income and to generate additional revenues for the Treasury, long standing enabling functions of independent commissions administering markets for the public interest.

For example, of many scholars, economist John Kenneth Galbraith captures this economic stimulation function most keenly. In *The New Industrial State* (1971), Galbraith observes that post war economic growth could not have been flourished so fully without commercial television. The national programming medium constantly introduced consumers to products and services through commercial sponsorship of programming and thereby induced citizens to purchase goods, which in turn stimulated production and aggregate demand.

It is noteworthy that the Commission did not disrupt the transmission format of black and white television in the transition to color television broadcasting nor did Congress

fundamentally alter very high frequency channel allocations when it authorized ultra high frequency broadcasting. In each instance, consumers' investments in receivers and broadcasters' investments in equipment convinced Commission and Congress to approve standards, which allowed for a smooth evolution of more and more consumer purchases and broadcaster investments. (Indeed, concerning the transition to digital high definition television, one can only look back with a 'what might have been' question as to whether this transition would not be so difficult had Commission and Congress approved DuMont's technology, enabling incremental increases in scanning lines.)

Now, in the Wireline notice the Commission articulates a comparable goal of stimulating aggregate demand for broadband communications through commitments to 'encourag[ing] the ubiquitous availability of broadband to all Americans,' (3), its capacious regulatory framework, 'includ[ing] any and all platforms capable of fusing communications power, computing power, high-bandwidth intensive content and access to the Internet,' (4) its implementation strategy as an independent commission, 'promot[ing] investment and innovation in a competitive market'… by limiting regulatory uncertainty and unnecessary or unduly burdensome regulatory costs'(5) while 'striv[ing] to develop an analytical framework that is consistent, to the extent possible, across multiple platforms (6).'

Prudentially, the Commission acknowledges that 'a consistent analytical framework may not lead to identical regulatory models across platforms' and that 'legal, market or

technological distinctions may require different regulatory requirements between platforms, or between certain types of providers of one particular platform (7).'

Second, the meat of the Notice (19-25) is its tentative conclusion that broadband access services over wireline networks are to be classified as an 'information service…using telecommunications'[1] presently entailing no common carriage obligations, and not as a telecommunications service, for which common carriage obligations remain long standing and presently unending.

This rhetoric is almost inspired. The Notice's tentative conclusions are as much regulatory circumlocution worthy of Trollope or Dickens[2] as rapier sharp regulatory

[1] Notice of Proposed Rule Making re CC Docket Numbers 02-33,95-20,98-10.

[2] 'Whatever was required to be done, the Circumlocution Office was beforehand with all the public departments in the art of perceiving--HOW NOT TO DO IT... …Numbers of people were lost in the Circumlocution Office. Unfortunates with wrongs, or with projects for the general welfare (and they had better have had wrongs at first, than have taken that bitter English recipe for certainly getting them), who in slow lapse of time and agony had passed safely through other public departments; who, according to rule, had been bullied in this, over-reached by that, and evaded by the other; got referred at last to the Circumlocution Office, and never reappeared in the light of day. Boards sat upon them, secretaries minuted upon them, commissioners gabbled about them, clerks registered, entered, checked, and ticked them off, and they melted away. In short, all the business of the country went through the Circumlocution Office, except the business that never came out of it; and its name was Legion. Sometimes, angry spirits attacked the Circumlocution Office. Sometimes, parliamentary questions were asked about it, and even parliamentary motions made or threatened about it by demagogues so low and ignorant as to hold that the real recipe of government was, How to do it. Then would the noble lord, or right honourable gentleman, in whose department it was to defend the Circumlocution Office, put an orange in his pocket, and make a regular field-day of the occasion. Then would he come down to that house with a slap upon the table, and meet the honourable gentleman foot to foot. Then would he be there to tell that honourable gentleman that the Circumlocution Office not only was blameless in this matter, but was commendable in this matter, was extollable to the skies in this matter. Then would he be there to tell that honourable gentleman that, although the Circumlocution Office was invariably right and wholly right, it never was so right as in this matter. Then would he be there to tell that honourable gentleman that it would have been more to his honour, more to his credit, more to his good taste, more to his good sense, more to half the dictionary of commonplaces, if he had left the Circumlocution Office alone, and never approached this matter. Then would he keep one eye upon a coach or crammer from the Circumlocution Office sitting below the bar, and smash the honourable gentleman with the Circumlocution Office account of this matter.' Charles Dickens, *Little Dorrit* (1857);

parsing grounded in agency discretion. The construction of 'using telecommunications' as a term of art elides telecommunications services classification and their attendant obligations, and is employed instead to forge boldly into a new regime of commercially negotiated broadband access to the Internet over wireline services.

The truth, as in so many of issues involving vast enterprises, is in the purchase of proponents. Those favoring common carriage of broadband access favor telecommunications services classification. Those endorsing commercially negotiated access for broadband communications embrace the information services classification.

Third, the Wireline Notice attests to significant disagreement on the means toward the laudable goals of stimulating economic growth and of realizing the public interest for broadband access to the Internet over wireline facilities (surely as important for present and future generations as broadcast television).

Mr. Daubeny rose, and with much graceful and mysterious circumlocution asked the Prime Minister whether it was true that a member of the House had been arrested, and was now in confinement on the charge of having been concerned in the murder of the late much-lamented President of the Board of Trade. He – Mr. Daubeny -- had been given to understand that such a charge had been made against an honourable member of that House, who had once been a colleague of Mr. Bonteen's, and who had always supported the right honourable gentleman opposite. Then Mr. Gresham rose again. "He regretted to say that the honourable member for Tankerville was in custody on that charge. The House would of course understand that he only made that statement as a fact, and that he was offering no opinion as to who was the perpetrator of the murder. The case seemed to be shrouded in great mystery. The two gentlemen had unfortunately differed, but he did not at all think that the House would on that account be disposed to attribute guilt so black and damning to a gentleman they had all known so well as the honourable member for Tankerville." So much and no more was spoken publicly, to the reporters; but members continued to talk about the affair the whole evening.' Anthony Trollope*, Phineas Redux,* 1874.

In part, such disagreements comprise the healthy and proper exchange of views essential to an independent commission as Marver Bernstein and James M. Landis[3] long ago noted.

In part, such disagreements represent quandaries inescapable at a time when once discrete communications systems operating under distinct regulatory regimes over several durations now are capable of executing substantially identical functionalities.

At issue is the preferable regulatory policy to provide certainty for heterogeneous industries across distinct legacy regulations. Endorsing the Commission's tentative conclusion that broadband access to the Internet is an information service, Chairman Michael K. Powell states 'this is *not* the time for timidity….[t]he time for action is now .' (emphasis in original). The Chairman expresses his concerns to diminish regulatory costs and to stimulate investment by effecting regulatory certainty. Commissioner Kathleen Q. Abernathy concurs by endorsing the Notice's tentative conclusions.

There, company pretty much parts. Commissioner Michael J. Copps chides the majority for disregarding 'previous determinations that reached a contradictory result.' He admonishes the majority that its 'reading of the statute appears to lead to the strange conclusion that Congress intended to remove these services from numerous competition, universal service and consumer protection provisions….' He notes that 'what we re really deciding is whether the transmission component for broadband services, including for

[3] Marver Bernstein, *Regulating Business by Independent Commission*, 1955; James M. Landis, *Report on Regulatory Agencies*, 1960.

Internet access, should be offered outside of the statutory framework that applies to telecommunications carriers.'

From another vantage, Commissioner Kevin J. Martin cautions against considering an 'Internet access tax' on wireless, cable or satellite providers through universal service obligations. Unlike Copps, who lauds the universal service portion of Notice and voices skepticism about much of the rest, Martin is critical of the universal service obligations for competitive communications, which are not monopolists historically, and embraces the balance.[4]

Fourth, suffusing the Notice, yet never expressly announced, looms industrial policy. Through its tentative conclusion, the Commission is unambiguously setting ground rules, which will reward regional Bell Operating companies, the dominant incumbent local exchange carriers (RBOCs, ILECs) as broadband winner and define competitive local exchange carriers (CLECs), Internet Service Providers and Interent Access Providers (ISP, IAP) as broadband losers. And, despite Commission Martin's reservations, the Commission may initiate a policy of tithing cable, wireless and satellite competitors in the provisioning of non-wireline broadband Internet access when markets are supposed to provide greater efficiencies.

Indeed, there is an oddness in the Notice concerning industrial policy: at once granting wide discretion over pricing and competition to larger, incumbent commercial enterprises

[4] Separate Statements of Michael K. Powell, Kathleen Q. Abernathy, Michael J. Copps and Kevin J. Martin

for essential elements of their networks yet contemplating the yoking of other, newer and smaller industries with obligations not customarily imposed on competitors.

There is, of course, nothing wrong with regulatory activism and exemplary public service as long as the former is well conceived and the latter decently executed. During the New Deal, Chairman James Lawrence Fly inflected creation of the National Television Standards Committee and the resulting NTSC standard to restrain absolute RCA domination of television and to enable other electrical and electronic enterprises to participate. Through his insistence on public service, he likely forestalled nationalization during World War II as well. New Frontier Chairman Newton Minnow is remembered for blasting commercial broadcasting as a vast wasteland following the vagrancies of some Commissioners in the Eisenhower Administration. Chairman Richard C. Wiley is esteemed for administrative efficiency. Commitments to decency and innovations in video dial tone are associated with Chairman Alfred Sikes. Chairman Dennis Patrick will forever be associated with ending the fairness doctrine while keeping the personal attack and other rules in place. Chairman Hundt may be recalled for initiating inquiries into regional bell operating company reporting. Chairman Kennard may never escape forbearance.

Commissioner Frieda Hennock is remembered for her insistence on broadcasters' public interest obligations, foresight concerning administrative and legal difficulties regulating broadcast speech and foresight reserving broadcast channels for educational television.

Commissioners Nicholas Johnson, Benjamin Hooks and James Quello are esteemed, respectively, for idealism, good sense and responsiveness.

Surely, these attainments and comportments remain worthy templates for policy and responsiveness.

The matter at hand in the Wireline Notice is how effectively the tentative conclusions of classifying broadband access to the Internet over wireline facilities as an information service advance or hinder the public interest.

Will the tentative conclusions yield benefits comparable or greater to those Chairman Fly inflected and Galbraith discerned in broadcasting?

Will they be remembered as rather like video dialtone?

Will they do any harm?

Comments

Sadly, the 'information service' tentative conclusion falters on its own terms. For all the rapier intelligence of the parsing, circumlocution prevails.

The Commission can and should not reclassify common carrier telecommunications services as a private carrier service, nor should it end common carriage obligations to information services providers for transmission over wireline facilities.[5]

Incumbent local exchange carriers yet exert too much market power to grant them discretion over wholesale pricing for broadband access. For example, the Wireline Bureau reported this past May that the ratio on incumbent to competitive local exchange carrier revenues as 9 to 1, with $118.6B for the ILECs and $12.6B for CLECs. It notes that Bell Operating Companies command a 75% share of local service revenues, other incumbent LECs control 15% and that competitive access providers and CLECs control but a 7.2% share of local service revenues.[6]

[5] AT&T comments, 'an existing common carrier telecommunications service can be reclassified as private carriage and exempted from Title II only if it does not, in fact, constitute telecommunications….or if the nature of and demand for the service is so limited and specialized that the public interest would not be harmed if it is available only on individually established rates, terms and conditions. The standalone broadband transmission services that incumbent LECs provide to ISPs and other customers today meet neither of these standards, because they provide transmission, are demanded by broad classes of customers who generally have no alternative suppliers, and readily can be – and have been – offered generally to the eligible public.' '…The Commission's Computer Inquiries safeguards require the Bells, if they provide broadband information services (as they all do), to make the underlying transmission components available to all information services providers.'

[6] The Federal Communications Commission, Wireline Competition Bureau, *Trends in Telephone Service*, May, 2002.

Nor, for all the appreciable growth of CLEC provisioning to some business customers, are ILECs any less dominant in their dominions over data services for large business customers.[7]

To be sure, the regional phone companies are in an odd spot. They are loath to dilute earnings by building out broadband services under current pricing rules and claim that they cannot afford to deploy high speed broadband communications unless they can charge wholesale access prices based on new infrastructure upgrades. Long distance voice, once the coveted prize when the RBOCs negotiated the Telecom Act in '94 and '95, will not deliver the revenues anticipated by the time the RBOCs through their own foot dragging receive permission from state regulators to offer long distance voice services. Wireless and cellular competitors are now competitive. The cable industry is successfully repurposing itself as a broadband telecommunications platform offering Internet services and local telephony in some systems in addition to entertainment. Indeed, Forrester Research estimates that by 2006 that American business and consumers will require 20 million fewer phone lines. Furthermore, the RBOCs do not really know whether their future is as structurally separate network and service enterprises, the most attractive track for Wall Street by creating investment vehicles with significant value and brand identity. Nor have they yet come to terms with acting as broadband wholesalers. In this flux, the regional phone companies wish to inflect regulation so they can have a bigger piece of the wireline broadband pie. Unlike cable, satellite and wireless

[7] Robert D. Willig finds that 'incumbent LEC control over …bottleneck facilities has allowed them to dominate the provision of data services to large business customers. He notes that LECs control 91.8% and 96.2% respectively of the frame relay and ATM revenues for local large business data services, i.e. intraLATA data traffic.' Declaration of Robert D. Willig.

competitors, they alone are impelled to interconnect with competitors, unbundle facilities, provide co-location space, resell services and provide advanced services through subsidiaries. In their minds, these telecom giants are mighty Gullivers constrained by regulation and by midget competitors, inhibiting their full powers and draining their energy. But, candidly, these are matters of corporate interest.

As the Commission strives to define broadband access to the Internet over domestic wireline facilities in the public interest, one is hard pressed to think of a more backward way to promote innovation and investment than to permit remonopolization for new, broadband services. Under the existing rules, new entrants spur innovation and investment both by the RBOCs and on their own as they compete to bring the greatest efficiencies to customers. With commercially negotiated broadband access rules, the RBOCs would receive a free hand to sweat their old copper plants and electro-mechanical switching well into the future while they can set prices for high speed services, which would effectively force fledgling competitors out of business. Upgrades will take place on their timetables. Not only do customers lose out, equipment manufacturers do too, becoming essentially the captives of the purchasing schedules of four regional oligopolies. If the FCC were to permit commercially negotiated prices for broadband access and services, the ruling would in effect carry RBOC smokestacks from electro-mechanical networks forward into the distributed networking of the electronic, information economy to the detriment of consumer welfare and national income. Indeed, the more one looks the less merit one can discern in such an approach. Under current rules, the regional phone companies must unbundle elements of their networks for

competitors. The RBOCs have to provide access at regulated prices for loops, local circuit switching, interoffice transmission facilities, signaling networks and call related databases, operations support systems and the high frequency portion of the loop, which enables DSL services. These rules have enabled consumer choice for broadband services as competitive providers developed a market presence.

If the Commission were to now to grant discretion over wholesale pricing for broadband access to incumbent local exchange carriers, it would be to the long term detriment of sustainable competition in broadband communications. Contemporary history is not encouraging. The regional Bell Operating Companies have been more willing to incur fines than open their networks since enactment of the Telecommunications Act of 1996 and show little sign of changing their posture.

While the may be a certain attractiveness in such so called stability of ILEC discretion over wholesale pricing for broadband access as a regulatory signal to the investment community that incumbent LECs are the broadband winners, such a signal is but a chimera and one to the detriment of stimulating aggregate demand and promoting broadband deployment.

Indeed, if such discretion were granted, the regional Bells and large ILECs could well remain as massive monopolies for small and medium size business markets and oligopolies at best in others to the detriment of the creation, monetizing, and capitalizing

of investment vehicles in broadband communications to the detriment of a vital investment community.

Nor can much value be countenance in inter modal competition between cable, wireless and satellite providers. SBC and Bell South, two of the RBOCs, collectively own Cingular, a major wireless player. Verizon also has a major wireless play. While cable passes many homes, only ten percent have subscribed to its broadband offerings. Furthermore, the cable, cellular and wireless industries each invested in and built out facilities with distinct product offerings: entertainment variety exceeding broadcast fare for cable, communications portability for the cellular and wireless. They did not do so with monopoly protections like those of the RBOCs, and as such, it is self-serving by RBOCs to now claim they deserve parity to charge market prices for broadband access and services.

While one could say that the Notice symbolizes a Commission affecting the posture of Tories doing Whiggish things getting broadband going after the burst Internet Bubble, the short sightedness of such a view dooms it at the outset. Pricing for broadband access and services over the networks of the regional phone companies should remain unbundled, because many of those network elements are not yet competitively available. Changing the rules on their pricing at this point would increase, not diminish, regulatory instability, confusion and cost. Adopting commercially negotiated access prices for broadband access to the Internet over domestic wireline facilities is pre-emptory. The Communications Act of 1996 requires implementation, not tinkering, to determine

optimum broadband deployment. State regulation and enforcement can and does promote competition in broadband access to the Internet over wireline facilities; a national policy should not pre-empt such affirmative public policy.

Lastly, the Commission may wish to re-assess whether it really wishes to base a regime of commercially negotiated broadband access to the Internet over domestic wireline facilities on the specifics of 'old' and 'new' technologies at this moment in time. The norm that some information processing is taking place so that the transmission is somehow different by the processing and hence any service that employs such processing power or functionality falls as one classification and not another raises so many questions across so many applications that it could well come back to haunt the Commission in future policy making for other communications platforms. There is, as well, the specter of arbitrary and capricious decision making, a lapse of congressionally delegated authority.

The prudential course and more stimulating industrial policy would seem to be the precedents of a graceful evolution and of greater opportunities for competitive participation like those in broadcasting inflected by Fly and acknowledged for their contribution to aggregate demand by Galbraith.

The arbitrary parsing of information services by contrast actually would seem to do harm.

Conclusion

Ninety years ago (1912) in charting the course of twentieth century regulation toward administered markets and away from Theodore Roosevelt's state/industry corporatism and William Howard Taft's laissez-faire policies, Louis Brandeis advised Woodrow Wilson that 'regulation is essential to the preservation and development of competition, just as it is necessary to the preservation and best development of liberty.'[8]

Comparably astute deregulatory policy, addressing distributed information networks, optical technologies and hybrid fiber, coaxial and copper transmission platforms, is now necessary for an orderly transition to a commercially negotiated access regime in broadband telecommunication.

The Commission should now exercise its congressionally delegated authority prudentially and impel incumbent local exchange carriers to adhere to common carriage regime for broadband access to the Internet over domestic wireline facilities until a competitive market is vital.

An earlier Commission, under the leadership of James Lawrence Fly, was able to put regulation in place that enabled many enterprises to participate in television; that is, without allowing RCA to dictate market absolutely.

[8] Thomas K. McCaw, *Prophets of Regulation*, 1984, p. 110.

Surely, the present Commission can do as well with broadband access to the Internet provided over domestic wireline facilities, so that competitive intra modal and inter modal technologies and markets will flourish.

It would be unfortunate if the Commission were simply to authorize regional Bell Operating Company domination of broadband access to the Internet provided over domestic wireline facilities.

Separately, Commissioner Martin's concerns about tithing cable, satellite and wireless competitors when markets are supposed to achieve the public interest and Commissioner Copps's concerns that universal service cannot be left as a legacy wireline voice service without some public policy aside from marketplace solutions impel further, separate consideration. Such concerns of market efficiency and failure, so candidly expressed, commend each Commissioner.